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In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS ("NASCAT") FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MOTION OF NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS ("NASCAT") TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, the National Association of Securities and Commercial Law Attorneys ("NASCAT") respectfully moves for leave to file the attached brief amicus curiae. Counsel for the Petitioners have consented to the filing of this brief. Counsel for the Respondents have given oral consent to the filing of this brief, and NASCAT expects to file written consent when it is received.

NASCAT is an association of law firms consisting of attorneys located throughout the United States. NASCAT

and its members advocate the enactment and enforcement of effective laws to protect investors from deceptive and manipulative practices and to ensure that the United States' securities markets operate freely and efficiently. NASCAT's members frequently represent plaintiffs in a variety of individual and class action cases prosecuted under the federal securities laws.[1] NASCAT and its members have a strong interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetrating securities fraud upon investors in this country. NASCAT accordingly is *strongly opposed* to the judicial creation of an implied cause of action for contribution to benefit those who commit securities fraud prohibited by section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j), and Rule 10b-5 promulgated thereunder.

Section 10(b) of the Securities Exchange Act of 1934 was designed to deter securities fraud and to make the victims of fraud whole. NASCAT and its members believe the implied cause of action for contribution interferes with these goals in several ways.

First, by spreading the cost of a judgment, an implied cause of action for contribution seriously undermines the deterrent effect of the federal securities laws. "Although courts have uniformly offered deterrence as a rationale for allowing contribution, thoughtful contemporary analysis indicates that a rule denying contribution in rule 10b-5 actions may actually operate as a greater deterrent than a rule permitting contribution." Mark J. Lowenstein, *Implied Contribution Under the Federal Securities Laws: A*

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[1] NASCAT members also have represented defendants in securities litigation and in other complex cases.

Reassessment, 1982 Duke L.J. 543, 573. Indeed, economic analysis "clearly refutes the argument that contribution should be favored because it yields more deterrence than no contribution, for the contrary is true." Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 353 (1980). A "rule of no contribution provides greater deterrence" to intentional wrongdoing than can "any rule of contribution."[2]

Second, the judicially created cause of action for contribution discourages settlement of securities fraud actions. A rule of no contribution encourages settlement and promotes equity because "[t]he competition to settle will magnify the relative payment of the more culpable parties."[3] Creation of a wrongdoers' right to contribution actually tends to discourage settlement and to impair their victims' prosecution of lawsuits.

Third, judicial creation of a cause of action to benefit those who commit fraud is unfair to victims of securities fraud. *See* Lowenstein, *supra*, 1982 Duke L. J. at 558. The

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[2] *Id.* at 332. Several judicial decisions acknowledge this point. *See Wilson P. Abraham Constr. Corp. v. Texas Industries, Inc.*, 604 F.2d 897, 903 & n.11 (5th Cir. 1979), *aff'd sub nom. Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (a rule denying contribution "may very well enhance the statutes' deterrent effect by preventing a defendant from cutting its losses"); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1105-06 (4th Cir. 1989) ("An even greater deterrent effect may exist if a single securities wrongdoer . . . is held liable for the total adverse judgment."); *see also Texas Industries*, 451 U.S. at 636. No decision that adopts contribution to enhance deterrence can claim to be based on sound economic analysis.

[3] Easterbrook, Landes & Posner, *supra*, 23 J. Law & Econ. at 354, 360; *see id.* at 368-70 (demonstrating this).

benefit to wrongdoers is offset by an injury to the victims of fraud in those jurisdictions that, like the Ninth Circuit, hold that the wrongdoers' right to contribution requires courts to reduce trial judgments awarded to victims of securities fraud based on the relative culpability of those who have already settled. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 112 L. Ed. 2d 192 (1990). Ordinarily, plaintiffs who settle with some defendants and proceed to trial against the rest are entitled to recover their full damages subject to an offset of the amount actually received in settlement. Under the *Kaypro* rule, however, victims of securities fraud who settle with some defendants and proceed to trial against the remaining defendants will frequently be prevented from collecting the full amount of their judgment. Under such a regime, the creation of a right to contribution imposes a tremendous penalty on plaintiffs who settle claims with some but not all jointly liable defendants – the defendants' right to contribution destroys the plaintiffs' right to be made whole. This, of course, discourages settlement of securities fraud actions. In addition, by reducing the damages that can be collected in securities fraud cases,[4] the existence of contribution subject to the *Kaypro* rule substantially reduces the aggregate liability of those who commit securities fraud and commensurately reduces the deterrent effect of the federal securities fraud statutes. NASCAT accordingly opposes judicial creation of an implied right to contribution under section 10(b) of the Securities Exchange Act of 1934 because the right to

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[4] *See generally* William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, at 203 (1987) (noting that a *Kaypro*-type rule "results in lower recoveries").

contribution interferes with the effective prosecution of securities fraud. But NASCAT also has an interest in seeing the questions surrounding the existence of an implied cause of action for contribution under section 10(b) settled once and for all. As described in the attached brief amicus curiae, the lower courts are in disarray on this question. The controversy over whether defendants have a right to contribution and the resulting controversy over how courts are to give effect to that right of contribution create substantial uncertainties that make the prosecution and settlement of securities fraud actions all the more difficult.

NASCAT accordingly seeks leave to file a brief amicus curiae urging this court to issue a writ of certiorari.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF NASCAT IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. INTRODUCTION

This is an important case that warrants review by this Court to resolve a conflict among the circuits and to bring the law of the Second, Fourth and Ninth Circuits into line with this Court's holdings in two lines of cases. The

Ninth Circuit's holding that there is a right to contribution under section 10(b) of the Securities Exchange Act of 1934 cannot be reconciled with this Court's precedents.

The first line of decisions with which the Ninth Circuit's decision conflicts governs when and how federal courts may create an implied cause of action for contribution to benefit wrongdoers liable under a federal statute that does not expressly provide for contribution. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), hold that a right to contribution may not be created by implication absent legislative intention to create such a cause of action.

A second line of decisions, best represented by *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477-78 (1977), governs when and how federal courts may create implied causes of action under section 10(b) of the Securities Exchange Act of 1934. Although an implied cause of action under section 10(b) has long been recognized under section 10(b)[5] and has been approved by Congress,[6] the scope of such actions is strictly limited to

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[5] *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976).

[6] In the recently enacted section 27A, for example, Congress provided for reinstatement of private civil actions under section 10(b) that might otherwise be barred by this Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991). *See* 15 U.S.C. § 78aa-1.

providing relief to victims of fraud and market manipulation. *Santa Fe* holds that additional causes of action may not be created under section 10(b) merely to further important policy objectives or to serve what is at best a subsidiary purpose of Congress in providing a remedy to victims of fraud. *Santa Fe* accordingly prohibits judicial creation of an implied cause of action to benefit those who commit securities fraud and are liable under section 10(b).

In addition to conflicting with precedents of this Court, the decision below also conflicts directly with decisions in the Seventh and Eighth Circuits which, unlike the Ninth Circuit, faithfully follow this Court's precedents in *Northwest Airlines* and *Texas Industries*. At present, the lower courts are in complete disarray, with most decisions recognizing a right to contribution that the Seventh and Eighth Circuits prohibit. Only review by this Court can restore consistency and order to the federal decisional law governing contribution under section 10(b).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND OFFERS IT AN OPPORTUNITY TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS

The decision below is appropriate for review because it cannot be reconciled with binding precedents of this Court. In addition, it offers this Court the opportunity to resolve a very important conflict among the Circuits.

A. The Ninth Circuit's Holding In This And Other Decisions, That There Is An Implied Cause Of Action For Contribution Under Section 10(b), Conflicts With The Rationale Of This Court's Decisions In *Northwest Airlines* And *Texas Industries*

In *Northwest Airlines* and *Texas Industries* this Court held that the federal judiciary may not imply a right to contribution in federal statutes if Congress did not intend to provide for one. Although this Court did not consider whether an implied cause of action for contribution could be created under the federal securities laws in order to benefit those who commit fraud, the principles set forth in *Northwest Airlines* and *Texas Industries* properly control the question. Several courts have so held. *See infra*. Nonetheless, the Second, Fourth and Ninth Circuits insist on continuing to recognize a judicially created right to contribution under section 10(b) of the Securities Exchange Act of 1934, placing them in direct conflict with precedents from the Seventh and Eighth Circuits.

In *Northwest Airlines*, this Court held that that contribution is not available under either the Equal Pay Act of 1983 or Title VII of the Civil Rights Act of 1964. The Court observed that a cause of action for contribution might be implied "if, among other things, the language of the statutes indicates that they were enacted for the special benefit of a class of which the [party seeking contribution] is a member." 451 U.S. at 91-92. The Court held that no right to contribution could be implied because "it cannot possibly be said that employers are members of the class for whose especial benefit either the Equal Pay Act or Title VII was enacted." *Id.* at 92 (citation omitted).

> To the contrary, both statutes are expressly directed against employers; Congress intended in these statutes to regulate their conduct for the benefit of employees. In light of this fact, [an employer liable under these statutes] "can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection.' "

Id. (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977)) (footnote omitted). No principles of federal common law permit a court to fashion a cause of action for contribution under a statute where Congress did not intend to provide one. *Id.* at 95-98.

The *Northwest Airlines* opinion left open the question of whether contribution may be implied under the antitrust acts because, "[i]n antitrust, the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute." *Id.* at 98 n.42. Five weeks later, in *Texas Industries*, this Court applied *Northwest Airlines* to hold that no implied cause of action for contribution may be created under either the Sherman or the Clayton antitrust acts because those acts "were not adopted for the benefit of the participants in a conspiracy to restrain trade." 451 U.S. at 639. The Court observed that "the Sherman Act and the provision for treble-damages actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade." *Id.* "On the contrary," the Court found, one who conspires to restrain trade " 'is a member of the class whose activities Congress intended to regulate for the protection and benefit *of an entirely distinct class*' " – the victims of such practices. *Id.* (quoting *Piper*, 430 U.S. at

37) (emphasis in original). Once again, nothing in principles of federal common law could justify creation of an implied cause of action for contribution under a statute when Congress itself did not intend to create one. *Id.* at 640-46.

Several district court decisions suggest that a right to contribution under section 10(b) may be judicially created because the United States Supreme Court expressly reserved the question in both *Northwest Airlines* and *Texas Industries*.[7] *Northwest Airlines* reserved the question of whether contribution might be implied under the antitrust laws, 451 U.S. at 98 n.42, and *Texas Industries* reserved the question of whether contribution might be implied in the federal securities laws,[8] but the principles laid down in those cases govern the judicial creation of contribution rights in any statutory scheme.

The rationale of *Northwest Airlines* and *Texas Industries prohibits* implication of a right to contribution under

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[7] *See, e.g., Baker v. BP America, Inc.*, 749 F. Supp. 840, 844 (N.D. Ohio 1990); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 885 (D.N.J. 1984); *In re National Student Marketing Litigation*, 517 F. Supp. 1345, 1349 (D.D.C. 1981).

[8] In *Texas Industries* the Court observed that decisions such as *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979), have held that under the federal securities laws "when an implied right of action exists under the securities laws, there also is an implied right to contribution." *Texas Industries*, 451 U.S. at 640 n.11. The Court "intimate[d] no view as to the correctness of these decisions" because contribution under the federal securities laws was not before it – just as contribution under the antitrust laws had not been raised in *Northwest Airlines*. *Id.*

section 10(b) if it was not designed to benefit those who commit securities fraud. In fact, section 10(b) was no more designed to protect those who defraud investors than were the Equal Pay Act and Title VII designed to protect employers, *see Northwest Airlines*, 451 U.S. at 92, or the antitrust laws to benefit those who conspire in restraint of trade. *See Texas Industries*, 451 U.S. at 639. Section 10(b) is a part of the Securities Exchange Act of 1934 which "was designed to protect investors against manipulation of stock prices"[9] by "implementing a 'philosophy of full disclosure.' "[10] *By its own terms* section 10(b) authorizes promulgation of rules and regulations that are "in the public interest *or for the protection of investors*." 15 U.S.C. § 78j(b) (emphasis added). It is *not* for the protection of those who perpetrate fraud. Under *Northwest Airlines* and *Texas Industries*, no cause of action for contribution may be implied under section 10(b).

B. The Ninth Circuit's Holding In This And Other Decisions, That There Is An Implied Cause Of Action For Contribution Under Section 10(b), Conflicts With This Court's Decisions In *Santa Fe Industries*

A handful of district court decisions seek to avoid *Northwest Airlines* and *Texas Industries* by holding that because the private cause of action under section 10(b) itself arises from implication, courts can do as they wish

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[9] *Basic Inc.*, 485 U.S. at 230.

[10] *Santa Fe Industries*, 430 U.S. at 477-78.

under the statute and create new implied causes of action as they choose.[11] The Eighth Circuit rejected such contentions in *Chutich*:

> Because federal courts implied the private right of action for substantive violations of section 10(b) and Rule 10b-5, federal courts have discretion to award appropriate relief to plaintiffs pursuing that right of action. It does not follow, however, that federal courts have common law power to create a new right of action for contribution accruing to defendants.

Chutich v. Touche Ross & Co., 960 F.2d 721, 724 (8th Cir. 1992).

Indeed, the argument itself disregards this Court's holding in *Santa Fe Industries*, 430 U.S. at 477-78, that the implied cause of action arising under section 10(b) *may not* be extended to actions that serve a subsidiary purpose of the statute and are not necessary to the fundamental protection of investors: "Although we have recognized an implied cause of action under [section 10(b)] in some circumstances, we have also recognized that *a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes in adopting the Act.*" *Id.* at 477 (citations omitted, emphasis added).

An implied cause of action to benefit those who commit fraud is hardly necessary to achieve – and in fact

[11] *See Baker*, 749 F. Supp. at 842-44; *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 615-16 (N.D. Ill. 1987).

is contrary to – Congress' fundamental purpose in adopting section 10(b), *see id.*, and federal courts are *not* authorized under section 10(b) to create private causes of action "to serve what is 'at best a subsidiary purpose' of the federal legislation."[12]

The *Northwest Airlines/Texas Industries* line of cases on when courts may create an implied cause of action to benefit wrongdoers, and the *Santa Fe Industries* line of cases limiting the creation of implied cause of action under section 10(b), converge to demand a single result: *federal courts may not create an implied cause of action for contribution to benefit those who commit securities fraud prohibited by section 10(b).*

C. Decisions From The Seventh And Eighth Circuits Hold That Under *Northwest Airlines* And *Texas Industries*, Federal Courts Are Not Free To Create An Implied Cause Under Section 10(b) Of Action For Contribution To Benefit Those Who Commit Fraud

Although several courts created an implied cause of action for contribution under section 10(b) and other provisions of the federal securities laws before *Northwest Airlines* and *Texas Industries* were decided, recent decisions in the Seventh and Eighth Circuits have held that this Court's decisions in *Texas Industries* and *Northwest Airlines* require a different result. The decisions from the Seventh and Eighth Circuits are in direct conflict with

[12] *Id.* at 478; *compare Piper*, 430 U.S. at 41-46 (limiting relief available for violations of section 14(e) of the Securities Exchange Act of 1934 and Rule 10b-6 promulgated pursuant to section 10(b)).

decisions of the Second, Fourth and Ninth Circuits which continue to recognize and impose a judicially created cause of action for contribution under section 10(b).

In *Heizer Corp. v. Ross*, 601 F.2d 330, 331-34 (7th Cir. 1979), the Seventh Circuit created an implied right to contribution under section 10(b) of the Securities Exchange Act of 1934. *Heizer* was one of the leading decisions establishing an implied right to contribution under section 10(b) before *Northwest Airlines* and *Texas Industries* were decided.[13]

"Significantly, after *Texas Industries*, the Seventh Circuit disavowed its analysis in the earlier leading case, *Heizer*, which held there is an implied right of action for contribution under section 10(b) and Rule 10b-5." *Chutich v. Touche Ross*, 960 F.2d at 723 (citation omitted). Indeed, the Seventh Circuit expressly repudiated *Heizer's* reasoning in *King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989), which applied *Northwest Airlines* and *Texas Industries* to reject contentions that a right to indemnification may be implied under section 10(b) of the Securities Exchange Act of 1934. "*King* annulled the reasoning in *Heizer*," *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124 (N.D. Ill. 1989), and *Heizer* has been effectively overruled so that "[n]o private cause of action for contribution may be implied under Rule 10b-5" in the Seventh Circuit. *Id.* at

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[13] The *Heizer* decision was cited by this Court in *Texas Industries* as one of the leading decisions creating an implied cause of action for contribution under section 10(b), *Texas Industries*, 451 U.S. at 640 n.11, and after *Texas Industries* was decided, *Heizer* provided a foundation for the Ninth Circuit law recognizing the judicially created right to contribution. *See infra*.

125 (footnote omitted). Binding principles set forth by this Court in *Northwest Airlines* and *Texas Industries* required this result. *Id.*

District courts in the Fourth[14] and Eighth[15] Circuits also recognized that under *Northwest Airlines* and *Texas Industries*, no implied right to contribution may be created to benefit those who violate federal securities statutes.

This year the Eighth Circuit itself joined these courts to hold that under *Northwest Airlines* and *Texas Industries*, "federal courts are powerless to create a right of action for contribution among violators of section 10(b) and Rule 10b-5 without a statutory or federal common law basis," *Chutich v. Touche Ross*, 960 F.2d at 723 (citations omitted), and that *no such basis exists*. *Id.* at 724. According to the Eighth Circuit, under *Northwest Airlines* and

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[14] *First Financial Savings Bank, Inc. v. American Bankers Insurance Co.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,827, at 94,453-54 (E.D.N.C. 1989), *overruled sub silentio, In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991), *as held in later opinion, First Financial Savings Bank, Inc. v. American Bankers Insurance Co.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,071, at 90,401-02 (E.D.N.C. 1991).

[15] *See, e.g., Chutich v. Green Tree Acceptance, Inc.*, 759 F. Supp. 1403, 1408 (D. Minn. 1991), *aff'd sub nom. Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992); *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,512, at 92,331 n.2 (W.D. Mo. 1991); *Nelson v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93,192-93 (D. Minn. 1989); *In re Professional Financial Management, Ltd.*, 683 F. Supp. 1283, 1285-87 (D. Minn. 1988).

Texas Industries, "federal courts have no common law power to create a right of action for contribution among violators of section 10(b) and Rule 10b-5." *Id.*

D. Decision Of Second, Fourth And Ninth Circuits Continue To Recognize A Judicially Created Right To Contribution Under Section 10(b), In Complete Disregard Of Controlling Law

The significance of *Northwest Airlines* and *Texas Industries* is clear. *See Chutich v. Touche Ross*, 960 F.2d at 723-24. No right to contribution may be created under section 10(b) unless it is clear that Congress intended to create one – and Congress clearly *did not*. *Id.* Nonetheless the Second Circuit,[16] Fourth Circuit[17] and Ninth Circuit[18] have continued to hold that federal courts may create such an implied cause of action for contribution under section 10(b) of the Securities Exchange Act of 1934. So

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[16] *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 578 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982).

[17] *In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991).

[18] *Employers Insurance of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575, 577-78 (9th Cir. 1992), Petition App. at 6; *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1228 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990); *Smith v. Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987).

have district courts in the in the First,[19] Second,[20] Third,[21] Fourth,[22] Sixth,[23] Tenth[24] and District of Columbia[25] Circuits.

These decisions fail to take adequate account of this Court's precedents. The Ninth Circuit first created an implied right to contribution under section 10(b) in *Smith v. Mulvaney*, 827 F.2d 558, decided six years after *Northwest Airlines* and *Texas Industries*. The court devoted a total of two sentences to analysis of this important issue:

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[19] *MFS Municipal Income Trust v. American Medical International, Inc.*, 751 F. Supp. 279, 281 (D. Mass. 1990); *In re Atlantic Financial Management, Inc. Securities Litigation*, 718 F. Supp. 1012, 1015 (D. Mass. 1988); *Kennedy v. Josephthal & Co.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,204, at 95,821 (D. Mass. 1983). *But see In re Atlantic Financial Management, Inc. Securities Litigation*, 603 F. Supp. 135, 137-38 (D. Mass. 1985).

[20] *Pepsico, Inc. v. Continental Casualty Co.*, 640 F. Supp. 656, 662 (S.D.N.Y. 1986); *Noonan v. Granville-Smith*, 532 F. Supp. 1007, 1008 (S.D.N.Y. 1982).

[21] *See, e.g., Wilder v. Williams*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,776, at 94,183 (W.D. Pa. 1989); *Seiler*, 102 F.R.D. at 885-86.

[22] *See, e.g., United States Fidelity & Guaranty Co v. Patriot's Point Development Authority*, 772 F. Supp. 1565, 1569 (D.S.C. 1991).

[23] *See, e.g., Baker*, 749 F. Supp. at 842-44; *Alexander Grant & Co. v. McAlister*, 669 F. Supp. 163, 165-66 (S.D. Ohio 1987).

[24] *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 550 (D. Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991).

[25] *In re National Student Marketing*, 517 F. Supp. at 1348-49.

> We hold that an implied right of contribution exists under Section 10(b) and Rule 10b-5. This is in accord with the other circuits that have decided this issue.

Id. at 560. The Ninth Circuit neither considered nor cited this Court's controlling decisions on when contribution may be implied. Instead, it relied on decisions such as *Heizer* which had *preceded* this Court's holdings in *Northwest Airlines* and *Texas Industries*.

While subsequent decisions of the Ninth Circuit on contribution under section 10(b) have cited and discussed *Northwest Airlines* and *Texas Industries*, they have *never* engaged in the analysis required by those decisions – which would compel the Court to join the Seventh and Eighth Circuits in rejecting implied causes of action for contribution under the securities statutes. The Ninth Circuit has adhered to earlier holdings that an implied right to contribution exists under section 10(b).

In *Franklin v. Kaypro*, 884 F.2d at 1228, the court cited *Northwest Airlines* for the proposition that "[n]ot all forums have laws governing contribution." *Id.* at 1228. Yet the Ninth Circuit failed to consider whether *Northwest Airlines'* holding permits judicial creation of a right to contribution under section 10(b). Instead, it followed the Seventh Circuit's decision in *Heizer* which had already been repudiated in the Seventh Circuit, *see supra*, citing *Heizer* to hold "it has been determined that a right to contribution exists under claims based on section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission's Rules, 17 C.F.R. § 240.10b-5." *Id.* at 1226. The Seventh Circuit's decision in *Heizer* was deemed to have more controlling authority

than this Court's subsequent decisions in *Northwest Airlines* and *Texas Industries*!

In this case the Ninth Circuit has chosen, once again, to ignore *Northwest Airlines* and *Texas Industries* and to follow the holdings of *Smith* and *Franklin v. Kaypro*, that a right to contribution may be created under section 10(b). The court cited *Northwest Airlines* for the proposition that "[t]he law of contribution is intricate,"[26] but it again failed to follow the holdings of this Court, that a right to contribution *may not be implied* in a statute in the absence of a legislative intent to create one. It held simply:

> No explicit right to contribution is provided for in section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5. We have recognized, however, that these provisions imply a right of contribution.

Id. at 577, Petition App. at 4.

The development of the law of contribution in the Fourth Circuit similarly illustrates the absolute incoherence of decisional law creating a cause of action for contribution under the federal securities statutes. In *Wassel v. Eglowsky*, 542 F.2d 1235 (4th Cir. 1976), *overruled by Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989), the Fourth Circuit created an implied cause of action for contribution under section 12(2) of the Securities Act of 1933. In *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1104-06 (4th Cir. 1989), the Fourth Circuit held that *Texas Industries* and *Northwest*

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[26] *Employers Insurance*, 954 F.2d at 578, Petition App. at 6.

Airlines effectively overruled its holding in *Wassel* and that under this Court's precedents no implied right of contribution may be created on behalf of those who commit securities fraud.

The Fourth Circuit rejected an implied right to contribution under the Securities Act of 1933, reasoning that "the statute's protection extends to investors who purchase securities based on misleading statements of material fact; it is not solicitous of unsuccessful defendants in a federal securities action." *Baker*, 876 F.2d at 1105. The "legislative history and structure of the federal securities laws do not suggest the recognition of implied rights of contribution. . . . " *Id.* In *First Financial*, ¶ 94,827, at 94,453-54, a Fourth Circuit district court accordingly held that under *Texas Industries* and *Northwest Airlines*, no right to contribution may be implied under section 10(b).

Then, in 1991, without any analysis of any kind – and without citing either *Northwest Airlines* or *Texas Industries* – the Fourth Circuit held that "it is well established that there is a right to contribution for parties jointly liable for violating Section 10(b) and Rule 10(b)-5." *In re Jiffy Lube*, 927 F.2d at 160 (citation omitted). Fourth Circuit district courts were required to reverse themselves, ignoring *Northwest Airlines* and *Texas Industries*, and to follow *In re Jiffy Lube*. *See, e.g., First Financial*, ¶ 96,071, at 90,401-02; *United States Fidelity*, 772 F. Supp. at 1569.

The Second Circuit's holding that there is a right to contribution under section 10(b) is similarly devoid of the analysis mandated by *Northwest Airlines* and *Texas Industries, see Sirota*, 673 F.2d at 578, but district courts in this

most influential Circuit are bound to follow it. *See, e.g., Pepsico*, 640 F. Supp. at 662; *Noonan*, 532 F. Supp. at 1008.

The Second, Fourth and Ninth Circuits thus are in irreconcilable conflict with the decisions of the Seventh and Eighth Circuits. It is a conflict that only review by this Court can resolve.

III. CONCLUSION

Courts in the Seventh and Eighth Circuits follow this Court's decisions and hold that no implied cause of action for contribution may be created to benefit those who commit fraud under section 10(b). Courts in the First, Second, Third, Fourth, Sixth, Tenth and District of Columbia Circuits hold to the contrary, imposing an implied cause of action for contribution under section 10(b) even after *Northwest Airlines* and *Texas Industries*. The lower courts are in disarray and only intervention by the Supreme Court can restore order to the precedents. This is an appropriate case for review by the Supreme Court.

Review by this court has been deemed appropriate where the decision below "appeared to be in conflict with our precedents." *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982). The Ninth Circuit's decisions conflict with this Court's reasoning in *Northwest Airlines* and *Texas Industries* which control how and when the courts may create an implied cause of action for contribution.

Review by this court is appropriate "to forestall a possible conflict in the lower courts" on an important

issue, even if there is "no direct conflict" among the several district court and court of appeals decisions on the question. *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 & n.4 (1980). It is appropriate where the district courts have fallen into conflict. *See, e.g., Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974). It is all the more appropriate here, where the decision below is in conflict with the decisions of this Court, the lower courts are in disarray, and the circuits are in direct and irreconcilable conflict. *See Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 237 (1964); *Commissioner v. Bider*, 369 U.S. 499, 501 (1962); Supreme Court Rule 10.1(a).

Review is particularly important in a case like this which involves important questions of law and the appropriate conduct of the courts in our system of constitutional federalism – and which affects literally hundreds of complex securities fraud actions brought to vindicate the interests of victims of fraud and manipulation.

The problem is not one that will correct itself if left to the lower courts which are in disarray. There is no likelihood that the Ninth Circuit will change its position of its own accord. The Court has *refused to hear* petitions for en banc rehearing in *both Employers Insurance* and *Franklin v. Kaypro*. Absent such en banc proceedings – or an *intervening* decision of this Court – panels of the Ninth Circuit are without power to depart from erroneous holdings of prior panels.[27] As erroneous as it may be, the right to contribution has become a firm fixture in the law of the circuit.

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[27] *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1285 (9th Cir. 1992); *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 707

(Continued on following page)

Public policy considerations also strongly support issuance of a writ of certiorari as to correct the decision below and to bring order to the circuits. Creation of a judicially implied cause of action for contribution is contrary to public policy because it reduces deterrence,[28] discourages settlement[29] and, in the Ninth Circuit, prevents victims of fraud from being made whole, and because it greatly increases the expense and burden of litigation – both for litigants and for the courts. *See* Motion For Leave To File Brief Amicus Curiae, *supra*.

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n.3 (9th Cir. 1989); *United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986) (Kennedy, J.); *Christoffel v. E.F. Hutton & Co.*, 588 F.2d 665, 667 (9th Cir. 1978), *overruled on other grounds by Hollinger v. Titan Capital*, 914 F.2d 1564 (9th Cir. 1990) (en banc).

[28] Mark J. Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L. J. 543, 573; Frank H. Easterbrook, William M. Landes, & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 332, 353 (1980).

[29] *See* Easterbrook, Landes & Posner, *supra* 23 J. Law & Econ. at 354, 360, 368-70.

NASCAT respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,

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